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MENTAL ILLNESS: A SMOKING GUN FOR FIREARMS RESTRICTIONS OR A MISSED TARGET?

Mollie Gelburd

I. INTRODUCTION

Violent acts demand the nation's attention. Several of the most high-profile mass shootings have involved both firearms and perpetrators with a record of mental health problems,¹ which has ignited a media firestorm calling for legislative restrictions on firearms possession for the mentally ill.² Consequently, recent mass shooting events have become an impetus for state and federal legislative proposals concerning firearms restrictions.³

The perception that mental illness is closely related to violence with a firearm transcends party lines, with even Republican representatives⁴ and firearms rights lobbying groups like the National Rifle Association⁵ looking

1. Ian Urbina & Manny Fernandez, *Virginia Tech Struggles to Recover from Shootings*, N.Y. TIMES (Apr. 23, 2007), <http://www.nytimes.com/2007/04/23/us/23vatech.html>; Marc Lacey & David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES, Jan. 9, 2011, at A1, <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html?pagewanted=all>; Seth Cline, *Bloomberg Challenges Obama and Romney on Gun Control After Colorado Shooting*, U.S. NEWS (July 20, 2012), <http://www.usnews.com/news/articles/2012/07/20/bloomberg-challenges-obama-and-romney-on-gun-control-after-colorado-shooting>; Philip Caputo, *Blame the Killing Machines: Guns*, WASH. POST, Dec. 21, 2012, at A23.

2. Caputo, *supra* note 1 (suggesting, days after a school shooting in Newton, Connecticut, that all semi-automatic assault weapons should be banned); *The Scourge of Concealed Weapons*, N.Y. TIMES, Dec. 23, 2012, at SR10 (asking that, in the wake of the shooting massacre in Newtown, Connecticut, lawmakers "devise new gun control strategies"); Emily Miller, *Hide Your Guns; Democrats Vow to Pursue More Gun-Control Laws*, WASH. TIMES (Sept. 6, 2012), <http://www.washingtontimes.com/news/2012/sep/6/hide-your-guns/> (evaluating legislative proposals for firearms restrictions, including a ban on assault weapons); Cline, *supra* note 1 (outlining then-New York City Mayor Michael Bloomberg's request for increased gun restrictions following the mass shooting in Aurora, Colorado).

3. Lindsey Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL'Y 149, 173 (2011).

4. *Public Safety and Second Amendment Rights Protection Act*, PAT TOOMEY, U.S. SENATOR PA. (Apr. 10, 2013), http://www.toomey.senate.gov/?p=press_release&id=965 (last visited May 1, 2013) (outlining a bipartisan legislative proposal introduced by Sens. Pat Toomey and Joe Manchin, which includes a provision providing for the creation of a commission to study acts of mass violence and mental illness).

5. *Why the NRA Keeps Talking About Mental Illness, Rather than Guns*, ECONOMIST (May 13, 2013, 10:00 PM), <http://www.economist.com/>

for ways to stop mentally unstable individuals from purchasing or possessing weapons. Representatives from all three branches of government have expressed similar sentiments: President Obama, in his campaign for reelection in 2012, rolled out a “comprehensive gun strategy” to keep firearms out of the hands of the “mentally ill;”⁶ lawmakers have used shooting tragedies as stepping-stones for political platforms⁷ and the U.S. Supreme Court, in 2008, upheld “longstanding prohibitions” on firearms possession by “the mentally ill.”⁸ Additionally, nearly half of Americans consider the mental health system more to blame for mass shooting events than easy access to guns, drug use, violent video games, the promulgation of extremist views, and insufficient property security.⁹ Despite this overwhelming bipartisan and public support, individuals in the scientific and medical communities have acknowledged the disproportionate emphasis on firearms restraints on the mentally ill and questioned whether this actually “reflects sound public policy or is a manifestation of exaggerated public perceptions of the danger associated with mental illness.”¹⁰

The Gun Control Act of 1968,¹¹ as amended, contains the principal federal restrictions on the commerce related to and possession of domestic firearms. The Gun Control Act codifies categorical restrictions on possession by certain classes of individuals, including the two-prong restriction that pertains to anyone “adjudicated as a mental defective or who has been

blogs/lexington/2013/03/guns-and-mentally-ill (last visited June 11, 2013) (quoting National Rifle Association spokesman Wayne LaPierre: “We have no national database of these lunatics. . . . We have a completely cracked mentally ill system [sic] that’s got these monsters walking the streets”).

6. President Barack Obama’s Remarks During the 2012 Presidential Debate at Hofstra University (Oct. 16, 2013). Transcript available at: http://www.washingtonpost.com/politics/decision2012/2012-presidential-debate-president-obama-and-mitt-romneys-remarks-at-hofstra-university-on-oct-16-running-transcript/2012/10/16/be8bfb9a-17dd-11e2-9855-71f2b202721b_story.html.

7. See, e.g., Miller, *supra* note 2.

8. District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008).

9. *Americans Fault Mental Health System Most for Gun Violence*, GALLUP POLL (Sept. 20, 2013), <http://www.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx>. In September of 2013, 48% of Americans blamed the mental health system for mass shootings, and fewer blame easy access to guns (40%), drug use (37%), violence in movies and video games (32%), spread of extremist views via the Internet (29%), insufficient security in public places such as schools and businesses (29%), and inflammatory language by political commenters (18%).

10. Paul S. Appelbaum & Jeffrey W. Swanson, *Gun Laws and Mental Illness: How Sound Are Restrictions?*, 61 L. & PSYCHIATRY 652, 653 (2010).

11. 18 U.S.C. § 921 (2006), *et seq.*

committed to a mental institution.”¹² This amendment to the Gun Control Act represents the first time Congress was able to impose commercial restraints on firearms “sales to those suffering from mental illness.”¹³ The purpose of the prohibitive categories is rooted in promoting public safety; specifically, the groupings are intended to deny classes of people determined to be of a special risk access to firearms.¹⁴ Currently, the special risk groups identified by the Act include: felons, fugitives from justice, unlawful users of controlled substances, anyone adjudicated as a mental defective or committed to a mental institution, illegal aliens or those admitted to the United States on a nonimmigrant visa, anyone who has renounced United States citizenship, anyone dishonorably discharged from the military, anyone under certain restraining orders relating to an intimate partner or child, anyone convicted of a misdemeanor of domestic violence,¹⁵ and minors under 18.¹⁶

To achieve the intended result of promoting public safety, the Gun Control Act’s prohibitions hinge on the existence and validity of the following presumptions: 1) that lawmakers are able to forecast the type of individuals that pose a greater risk of gun violence than other categories of people; 2) that the statutory text pertaining to the restrictive categories adequately describes and comprehensively encompasses risky individuals;¹⁷ and 3) that there are effective enforcement mechanisms in place that prevent those individuals identified in the law from taking possession of firearms.

The focus of this Note is on the relationship between gun legislation and mental illness; therefore the following pertains to the prohibitive category “adjudicated as a mental defective” or “committed to a mental institution,” which is codified at 18 U.S.C. sections 922(g)(4) and 922(d)(4). This

12. 18 U.S.C. § 922(g)(4) (prohibiting these individuals from possession firearms). See also 18 U.S.C. § 922(d)(4) (criminalizing the sale or transfer of firearms to these persons).

13. See Anthony P. Dunbar, *Torts—Liability of A Gun Dealer for Selling to a “Mental Incompetent”*, 58 TUL. L. REV. 1263, 1265-66 (1984).

14. See *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (“The principal purpose of the federal gun control legislation . . . was to curb crime by keeping ‘firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’”) (quoting S. REP. NO. 1501, at 22 (1968)). See also *Barrett v. United States*, 423 U.S. 212, 218 (1976) (“Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means.”).

15. 18 U.S.C. §§ 922(g)(1)-(9).

16. *Id.* at § 922(b)(1).

17. See generally Jeffrey Swanson, *Good News and Bad News About Gun Laws, Mental Illness and Violence—Part 1*, HARV. L. BLOG (Oct. 5, 2012), <https://blogs.law.harvard.edu/billofhealth/2012/10/05/good-news-and-bad-news-about-gun-laws-mental-illness-and-violence-part-1/> (last visited May 1, 2014).

category raises concerns with respect to all three presumptions. First, scientific research examining the relationship between mental disorders and a propensity for violence is inconclusive,¹⁸ and researchers studying the topic have warned that developing a “generalizable set of criteria for dangerous prediction in law and mental health” has been described as “an elusive and distant objective.”¹⁹

Second, assuming such a relationship exists, federal legislation, as written, is ambiguous and unclear, making it difficult to apply the law in any practical sense.²⁰ The term “mental defect” could cover a broad range of cognitive disorders, ranging from an intellectual disability to any diagnosable mental illness.

Lastly, on a procedural level, in order to identify and flag prohibited persons, federal firearms law utilizes a background check system, which is reliant upon the quality and quantity of disqualifying records. State participation in providing disqualifying records to the federal database is voluntary and reporting has proved to vary widely among states, with some states over-reporting and others failing to report noncriminal records at all.²¹ Additionally, background checks only apply to future purchases, and do not prevent prohibited persons from gaining access to firearms through a housemate, at an unregulated gun show, or even from retaining possession of once lawfully possessed firearms following an event that would otherwise disqualify them from handling weapons.²²

This Note will review more closely the three above outlined presumptions. Section II of this Note will examine in closer detail the relevant federal law regulating firearms. Section III will review the growing body of state law that purports to more heavily regulate firearms possession. Next, Section IV will set forth the breadth of mental illness research and suggests that mass shootings should be reviewed as an additional area of

18. See *infra* Section IV.

19. James Bonta, et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOLOGICAL BULLETIN 123, 124 (1998).

20. See, e.g., *United States v. Hansel*, 474 F.2d 1120, 1123 (8th Cir. 1973) (“[W]e are left to ourselves to determine the meaning of the term ‘mental defective’ . . . without any revealing guides as to the intent of Congress.”).

21. See U.S. GOV’T ACCOUNTABILITY OFFICE, IMPLEMENTATION OF THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 3 (2000); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-684, GUN CONTROL, SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST IN PROVIDING RECORDS FOR BACKGROUND CHECKS 9 (2012).

22. A small minority of states have established procedures for confiscating firearms from individuals. See, e.g., IND. CODE § 35-33-1-1.5 (permitting a law enforcement officer responding to an alleged crime of domestic violence to confiscate a firearm from the scene).

study, apart from the study of the relation between mental illness and general violence.

II. FEDERAL STATUTORY LAW REGULATING FIREARMS

Two federal statutes set forth the principal guidelines regulating the commerce in and possession of firearms by private individuals: the National Firearms Act of 1934 (“NFA”)²³ and the Gun Control Act of 1968 (“GCA”).²⁴ The NFA was originally enacted in 1934 to strictly regulate and tax “gangster” weapons, such as machine guns, firearm mufflers and silencers, short-barreled shotguns and rifles, destructive devices, and “any other weapon” defined in the Act.²⁵ As enacted, the NFA established a registry of weapons within its purview, which includes information identifying the firearm, the firearm’s owner, and the date of registration.²⁶

On the other hand, the GCA covers conventional weapons, such as handguns, shotguns, and rifles, and applies to anyone in the business of manufacturing, importing, selling, or transferring firearms, by requiring that merchants obtain a federal license and comply with strict guidelines.²⁷ All federally licensed dealers must abide by the provisions of the GCA and its implementing federal regulations, which require keeping meticulous records of all firearms sales and recording the identity of all purchasers.²⁸ Private citizens, at least at the federal level, do not need a license to purchase or possess a conventional firearm, or to effectuate the private transfer of a firearm to another individual.²⁹

Since its inception, the legislative aim of the GCA has been to aid law enforcement officers in curbing violence “by keeping ‘firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’”³⁰ As enacted in 1968, however, the regulations on firearms sales to the enumerated categories of prohibited

23. National Firearms Act, ch. 757, 48 Stat. 1236, 1236-40 (1934) (codified as amended at 26 U.S.C. ch. 53).

24. 18 U.S.C. § 921 *et seq.*

25. 26 U.S.C. § 5845(e).

26. *See generally* U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, ATF NATIONAL FIREARMS ACT HANDBOOK (2009).

27. *See* 18 U.S.C. § 922(a).

28. *Id.* *See also* 27 C.F.R. Part 478 (containing the implementing administrative regulations under the GCA).

29. While there is no license requirement at the federal level, a minority of states, such as Hawaii, Illinois, and New Jersey, require private citizens to obtain a license or permit before possessing or acquiring certain firearms. *See, e.g.*, HAW. REV. STAT. § 134-2 (2013); 430 ILL. COMP. STAT. 65/1 *et seq.* (2013); N.J. STAT. § 2C:58-3 (2013).

30. *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quoting S. REP. NO. 1501, at 22 (1968)).

persons contained no identification verification method; the GCA provided only that it was unlawful for a dealer to sell or dispose of a weapon if the dealer *knew* or had *reasonable cause* to know that the potential buyer was within a prohibited category,³¹ and further provided that it was unlawful for a prohibited person to possess a firearm.³² This meant that, to effectuate a firearms sale to a potential buyer, a dealer needed only to verify with the potential purchaser himself that he was not within one of the restricted categories.³³

The need for a more effective enforcement mechanism became immediately apparent;³⁴ however it was not until the Brady Handgun Violence Prevention Act, implemented in 1993, that a background check requirement was codified.³⁵

The Brady Handgun Violence Prevention Act (“Brady Act”), proposed as an amendment to the GCA in 1987, was a response to mounting violence involving firearms across the United States and was galvanized by and named for the assassination attempt on President Reagan, which left White House Press Secretary, James Brady, disabled.³⁶ The Brady Act laid dormant until 1993, at which point it received bipartisan support in both the House and Senate and was signed into law by President Bill Clinton on November 30, 1993.³⁷ Its object was to create a waiting period for all handgun purchases made from federally licensed sellers, so that local law enforcement agents could conduct a background check into the potential purchaser’s personal history using any available criminal or noncriminal records.³⁸ There were two stages of the Brady Act—the interim stage, codified in section 922(s) of the GCA, and the permanent stage, codified in section 922(t). The purpose of the interim stage was to allow the federal

31. 18 U.S.C. § 922(d) (emphasis added).

32. 18 U.S.C. § 922(g).

33. See Michael J. Delaney, *Lethal Weapon: Will Tenth Amendment Challenges Kill the Brady Act?*, 56 OHIO ST. L.J. 1217, 1219-20 (1995) (“Without the requirement of a waiting period and background check, the Gun Control Act, instead, relied upon self-certification whereby a prospective gun purchaser would sign a sworn statement attesting to their capacity to purchase a firearm”); but see Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 418 n. 11 (1995) (indicating that some states implemented their own enforcement mechanisms through a background check system, but there was no such system at the federal level at the inception of the GCA).

34. Delaney, *supra* note 33, at 1219.

35. Dyan Finguerra, *The Tenth Amendment Shoots Down the Brady Act*, 3 J.L. & POL’Y 637, 639 (1995); see also Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended).

36. Finguerra, *supra* note 35, at 637-41. The man who perpetrated the shooting had a “history of mental instability” yet “easily obtained a handgun.” *Id.* at 637.

37. *Id.* at 640.

38. *Id.*

government time to develop a national background check system, aptly named the National Instant Criminal Background Check System (“NICS”) and run by the Federal Bureau of Investigations (“FBI”), which would create a comprehensive system of state and federal records disqualifying prohibited persons.³⁹ Under the interim provisions, set to expire on November 30, 1998, federally licensed firearms sellers would conduct background checks by contacting the purchaser’s chief local law enforcement officer (generally a police officer or sheriff), who would then have five days to conduct a reasonable investigation into the potential purchaser’s personal records to determine if they were a lawful purchaser.⁴⁰

Before the interim provisions sunset in November of 1998, two state law enforcement officers challenged the constitutionality of the Brady Act, arguing that Congress could not compel them, as state officials, to participate in a federal regulatory program.⁴¹ The Supreme Court agreed, holding in the 1997 decision, *Printz v. United States*, that the Brady Act unconstitutionally required state officials to conduct background checks pursuant to a federal program.⁴² *Printz* had a considerable impact on Tenth Amendment jurisprudence, in that it strongly reinforced state sovereignty vis-à-vis the federal government,⁴³ and curtailed the effectiveness of the Brady Act by making state participation in the NICS voluntary and not mandatory.⁴⁴

Post-*Printz*, the federal government cannot require state executive branch employees to conduct background investigations; however all federally licensed dealers must still run background checks (with very limited exceptions)⁴⁵ before transferring any private purchaser a firearm.⁴⁶ More importantly, the *Printz* decision also meant that states were no longer compelled to provide disqualifying records to the federal program, and consequently, most records that populate the NICS database are from federal sources.⁴⁷

39. See 28 C.F.R. § 25.5 (2013).

40. Brady Handgun Violence Prevention Act, Pub. L. No.103-159, 107 Stat. 1536 (1993).

41. See *Printz v. United States*, 521 U.S. 898, 904 (1997); see also Finguerria, *supra* note 35, at 641-45.

42. *Printz*, 521 U.S. at 934-35 (finding the interim provisions of the Brady Act unconstitutional).

43. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2195-96 (1998).

44. *Id.* at 2184-85.

45. See 27 C.F.R. § 478.102(d) (2013) (enumerating exemptions for NICS checks, which include if the potential firearms purchaser is a licensed seller).

46. *Id.* at §§ 478.102(a)-(c).

47. 28 C.F.R. § 25.4 (“It is anticipated that most records in the NICS Index will be obtained from Federal agencies. It is also anticipated that a limited number of authorized

The background check system currently works as follows. Before transferring a firearm to a potential purchaser, a federal firearms dealer must check the individual's identifying information against the records in the NICS database and receive a result of proceed, delay, or deny, typically within a few minutes.⁴⁸ In a properly functioning system, a denial indicates that the potential purchaser was associated with a disqualifying record and the transfer must not proceed.⁴⁹ A delay can occur when records in the database are incomplete or missing and require that the firearms dealer undertake additional research in order to make a determination regarding the inquiring buyer.⁵⁰ After three business days, however, even if the dealer failed to obtain a "proceed" response, he may continue with the transfer of the weapon.⁵¹

Even a brief overview of the NICS exemplifies how the effect of a background check is premised on the quality, quantity, and availability of disqualifying records. Reports during the early stages of the implementation of the NICS indicate that, as feared by federal authorities, states were neglecting to provide disqualifying records to the NICS, particularly noncriminal records.⁵²

The deficiencies of the NICS were not seriously addressed by legislators until the shooting massacre at Virginia Tech on April 16, 2007, when a gunman, who was ordered by a Virginia magistrate to stay overnight in a psychiatric hospital in December of 2005, killed 32 people after successfully purchasing the two pistols he used in his massacre.⁵³ Under federal law,

state and local law enforcement agencies will voluntarily contribute records to the NICS Index. Information in the NCIC and III systems that will be searched during a background check has been or will be contributed voluntarily by Federal, state, local, and international criminal justice agencies.").

48. 28 C.F.R. §§ 25.6(a)-(c).

49. *Id.* at § 25.6(c)(1)(iv)(C).

50. *Id.* at § 25.6(c)(1)(iv)(B).

51. *Id.*

52. U.S. GOV'T ACCOUNTABILITY OFFICE (2000), *supra* note 21, at 5.

53. MASS SHOOTINGS AT VIRGINIA TECH, REPORT OF THE VA. TECH REVIEW PANEL (Aug. 2007), *available at* <https://governor.virginia.gov/TempContent/techPanelReportcfm>. [hereinafter REPORT OF THE VA. TECH REVIEW PANEL]. After conducting an extensive review into the Virginia Tech shooter's past, a panel concluded that the shooter exhibited signs of mental instability since childhood. While enrolled as a student at Virginia Tech, the shooter invoked the attention of authorities after he sent messages to his suitemate stating he "might as well kill [him]self." As a result, on December 13, 2005, a social worker with the New River Valley Community Services Board, a public agency that provides behavioral health services to area residents, recommended committing the shooter and located a psychiatric bed at a local hospital. A Virginia magistrate then concluded that the student was "an imminent danger to self or others" and issued a temporary detention order, resulting in an overnight stay in a local hospital's psychiatric department. The following day, on December 14, 2005, a commitment

regulations promulgated under the GCA define a commitment to a mental institution as requiring “[a] determination by a court, board, commission, or other lawful authority that a person, as a result of . . . mental illness . . . [i]s a danger to himself or to others.”⁵⁴ Virginia law in place at the time prohibited firearms possession by any individual adjudicated as “legally incompetent” or “mentally incapacitated,” or by anyone admitted as a patient to an institution on an involuntary basis.⁵⁵ The Virginia Tech shooter was ordered an overnight stay in a hospital, but was never formally admitted to an institution for an inpatient stay, adjudicated as being incompetent or otherwise disqualified from firearms ownership under Virginia law. Consequently, his name was never entered into the database of disqualifying records, and he was able to purchase firearms from a licensed dealer without triggering a denial.

Within days of the shooting, Congress proposed new legislation, the NICS Improvement Amendments Act of 2007 (“NIAA”),⁵⁶ in an effort to fix the loopholes in the system and to incentivize state participation in the NICS. The bill was signed into law by President George W. Bush in January 2008 as an amendment to the GCA.⁵⁷ The NIAA amendments were mainly in the form of grants to states and were aimed at encouraging them to supply the NICS with records, particularly any disqualifying mental health records, for upgrading their electronic systems, and for collecting and analyzing records to populate the databases with.⁵⁸

The Government Accountability Office reviewed the status of the NICS following the implementation of the NIAA and reported that mental health records provided by states increased by a dramatic 800 percent, from 126,000 to 1.2 million records in 2011.⁵⁹ The increase, albeit encouraging, was due in large part to the efforts of just twelve states;⁶⁰ thirty states failed to provide *any* noncriminal records to the database, even after the NIAA was

hearing was held and an independent psychologist and hospital psychiatrist indicated the shooter was *not* a danger to himself or others, and a special justice overseeing the proceeding ordered treatment as an outpatient, finding “there [was] no indication of psychosis, delusions, suicidal or homicidal ideation.” The shooter was then released with instructions to follow up with the college’s counseling services, which he failed to do. *Id.*

54. 27 C.F.R. § 478.11 (2012). Excluded from the federal regulatory definition is a commitment for the purpose of observation or a voluntary admission to an institution. *Id.*

55. REPORT OF THE VA. TECH REVIEW PANEL, *supra* note 53. *See also* VA CODE § 18.2-308.1:2 (2007); VA CODE § 18.2-308.1:3 (2007).

56. NICS Improvement Amendments Act of 2007, Pub. L. 110-180, 121 Stat. 2559 (2008).

57. *Id.*

58. GOV’T ACCOUNTABILITY OFFICE (2012) *supra* note 21, at 9, 28.

59. *Id.* at 9.

60. *Id.*

passed.⁶¹ States that were negligent in their participation cited technological challenges, conflicting state privacy laws, insufficient funding, and a lack of incentive as factors that limited their ability to provide records.⁶²

A. Interpreting the Meaning of “Mental Defective” and “Committed to A Mental Institution”

The Virginia Tech tragedy drew attention to the ambiguity of the definitions contained in the GCA and revealed how state law definitions can be conflicting. When the GCA was enacted, it was the first time that lawmakers were able to pass legislation banning firearms sales to individuals considered to be “mentally defective,”⁶³ however there is very limited “available legislative history [that] provide[s] a clear statement of how [the] peculiar language of section 922(d)(4) [and 922(g)(4)] was chosen.”⁶⁴ Generally, when a statute contains ambiguous language, the legislative history serves to clarify lawmakers’ intent. Legislators spoke of restricting the following individuals from gun ownership: “psychotics,”⁶⁵ “psychopaths,”⁶⁶ “the mentally deficient,”⁶⁷ “mentally unstable,”⁶⁸ “persons with a history of mental disturbances,”⁶⁹ “mentally delinquent,”⁷⁰ “antisocial or violence prone,”⁷¹ and “deranged persons.”⁷²

Congress eventually settled on and codified the selected language, however, the congressional record does little to help make a practical determination as to who should be restricted from firearms possession.⁷³

B. Guidance from Federal Regulations

In an effort to clarify and more narrowly define the federal statutory language, the Bureau of Alcohol, Tobacco, Firearms and Explosives

61. *Id.* at Introduction, 21.

62. *Id.* at 11-13.

63. See 18 U.S.C. § 922(d) (1982); see also Dunbar, *supra* note 13, at 1265-66.

64. Dunbar, *supra* note 13, at 1265.

65. *Id.* (citing 114 CONG. REC. 23070 (1968) (remarks of Rep. Anderson)).

66. Dunbar, *supra* note 13 at 1265 (citing 114 CONG. REC. 27404 (1968) (remarks of Sen. Percy)).

67. Dunbar, *supra* note 13, at 1265 (citing 114 CONG. REC. 23072 (1968) (remarks of Rep. Horton)).

68. 114 CONG. REC. 13220 (1968) (remarks of Sen. Tydings).

69. *Id.* at 21784 (remarks of Rep. Celler).

70. *Id.* at 21781 (1968) (remarks of Rep. Sikes).

71. *Id.* at 21817 (1968) (remarks of Rep. Schwengel).

72. *Id.* at 21819 (1968) (remarks of Rep. Halpern).

73. See Dunbar, *supra* note 13, at 1265-66; see also Jana R. McCreary, *Falling between the Atkins and Heller Cracks: Intellectual Disabilities and Firearms*, 15 CHAP. L. REV. 271, 285 (2011).

(“ATF”), now operating under the Department of Justice,⁷⁴ promulgated administrative regulations under the GCA.⁷⁵ Under ATF’s regulations, in order to be “adjudicated as a mental defective,” a court or other lawful authority must find that a person, “as a result of marked subnormal intelligence or mental illness, incompetency, condition, or disease” is either a danger to himself or others, or lacks the mental capacity to contract or manage his own affairs.⁷⁶ This includes “[a] finding of insanity by a court in a criminal case,” and anyone “found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to the [relevant articles of] Uniform Code of Military Justice.”⁷⁷ It is noteworthy that this definition expands “mental defect” to encompass both diminished intellectual capacity and mental illness, but also adds an element that requires a finding of either dangerousness or incompetency.

The second prong of federal legislation, “committed to a mental institution” was clarified by ATF’s regulations to mean any “formal commitment of a person to a mental institution” by a court or lawful authority, where the commitment is pursuant to “mental defectiveness or mental illness” or for drug use.⁷⁸ Formal commitments, under the regulation, do not include persons hospitalized for observation or on a voluntary basis.⁷⁹

The Department of Justice recently recognized “that the term ‘mental defective’ is outdated,” however, as an administrative body, it cannot amend the statutory text. As a result, the Department proposed a new rule to amend the regulatory definition to include anyone “found not guilty by reason of insanity, mental disease or defect, or lack of mental responsibility by a court in a criminal case,” “persons found guilty but mentally ill by a court in a criminal case in a jurisdiction that provides for such a finding,” and also “[t]hose persons found incompetent to stand trial by a court in a criminal case.”⁸⁰ The proposed regulatory definition of “mental defect” also excludes certain people from the prohibited persons category, if a person petitions for relief from the disability under either federal or state law.⁸¹

74. *ATF’s History*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <http://www.atf.gov/about/history/index.html> (last visited Dec. 20, 2013).

75. *See generally* 27 C.F.R. Part 478 (2012).

76. *Id.* § 478.11 (defining the term “adjudicated as a mental defective”).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution,”* 79 Fed. Reg. 774-01 (Jan. 7, 2014).

81. *Id.*

The federal regulatory definitions of “mental defect” and “committed to a mental institution” are merely persuasive, not dispositive, in courts.⁸² Accordingly, federal courts have taken a variety of approaches when interpreting GCA terms: some jurisdictions accept and apply the federal regulations, which contain an element requiring a finding of either dangerousness or incapacity,⁸³ while other jurisdictions expressly decline to consider federal regulations when analyzing cases under the GCA, in favor of either following previous judicial precedent decided prior to the implementation of the regulations,⁸⁴ or in favor of deferring to state law definitions.⁸⁵

C. The Supreme Court: Upholding Longstanding Restrictions

Despite legislative efforts to further restrict and more heavily regulate the use of firearms, the Supreme Court unequivocally expanded the right to bear arms in the 2008 decision, *District of Columbia v. Heller*⁸⁶ and the 2010 decision *McDonald v. Chicago*.⁸⁷ Together, these cases held that the right to keep and bear arms for self-defense in a home is an individual, albeit limited, right and is incorporated and applicable to the states.⁸⁸ Both cases tackled the broad issue of reviewing the Second Amendment and determining the constitutionality of city ordinances that effectively precluded residents from possessing firearms in their homes.⁸⁹ As a result, since the Court was answering conceptual constitutional questions, the opinions in both *Heller* and *McDonald* avoided addressing more practical

82. See, e.g., *United States v. B.H.*, 466 F. Supp. 2d 1139, 1146 (N.D. Iowa 2006).

83. *United States v. Vertz*, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) *aff'd*, 40 F. App'x 69 (6th Cir. 2002) (applying the federal regulatory definition of “adjudicated as a mental defective” and holding that, since there was no requisite judicial finding of dangerousness or incapacity, the defendant’s “adjudication is not sufficient to bring [him] within the statute”). *Id.*

84. *B.H.*, 466 F. Supp. 2d at 1146 (declining to use the “broader” definition of “mental defective” defined in ATF regulations and instead holding that “the phrase ‘mental defective’ is a term of art with a long history in psychology and the law”). The Court in *B.H.* was “bound to follow” precedent set forth in *United States v. Hansel*, 474 F.2d 1120 (8th Cir. 1973), decided *prior* to the adoption of ATF regulations, which held that “mental defective as used in the Gun Control Act does not include mental illness,” but instead refers to a “person who has never possessed a normal degree of intellectual capacity.” *Hansel*, 474 F.2d at 1123-25.

85. See, e.g., *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012).

86. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

87. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

88. See *id.* at 3021. While the opinion is a plurality, a majority of 5-4 held that the Second Amendment is applicable to the states. However Justice Thomas stated a different basis for incorporation. See *id.* at 3058 (Thomas, J., concurring in part).

89. *Heller*, 554 U.S. at 576; *McDonald*, 130 S. Ct. at 3026.

concerns, such as the scope of particular provisions of legislation that restrict firearms to a lesser degree than outright local bans.⁹⁰

The *Heller* analysis focused on the text of the Second Amendment,⁹¹ which provides that: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁹² Writing for a 5-4 majority in *Heller*, Justice Antonin Scalia interpreted the scope of the Second Amendment by reviewing its express text and engaging in an extensive analysis of its history, which extends back to the English Bill of Rights in the seventeenth century,⁹³ and found that: “There . . . [is] no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”⁹⁴

The *Heller* controversy arose after Dick Heller, a police officer in the District of Columbia, was refused a certificate to register a handgun in his home under District of Columbia laws that effectively banned handgun ownership in homes.⁹⁵ Mr. Heller sought to enjoin the District of Columbia from enforcing the laws, challenging the provisions on Second Amendment grounds.⁹⁶ The Supreme Court agreed with Heller and overturned two District of Columbia statutes restricting handgun use, reasoning that handguns are a “quintessential self-defense weapon,” and that defense of the home, of all places, is paramount.⁹⁷

1. Second Amendment Rights Are Not Absolute

The *Heller* Court was quick to limit the scope of the Second Amendment and stated the rights it confers are not absolute.⁹⁸ Justice Scalia indicated that there are certain restrictions that have been historically understood to limit potential harm and prevent individuals who pose a risk to society from possessing weapons.⁹⁹ In contrast to the extensive historical analysis used to

90. See *McDonald*, 130 S. Ct. at 3108 (noting that “[t]he practical impact of various gun-control measures may be highly controversial, but this basic insight should not be”).

91. *Heller*, 554 U.S. at 576.

92. U.S. CONST. amend. II.

93. See generally *Heller*, 554 U.S. at 618-28 (describing the historical context of the Second Amendment).

94. *Id.* at 595.

95. *Id.* at 574-76.

96. *Id.* at 575-76.

97. *Id.* at 574-75, 628-29, 635 (overturning two District of Columbia statutes, one banning handgun possession in homes and another requiring that all lawful guns in a home be locked; a third statute regarding licensing was also contested by Heller, however the Court did not reach the validity of this statute).

98. *Id.* at 626.

99. *District of Columbia v. Heller*, 554 U.S. 570, 626-27, n.26 (2008).

justify the holding of *Heller*, Justice Scalia raises, then dismisses the “presumptively lawful regulatory measures,” writing (albeit in dicta) that:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁰⁰

Chief Justice Stevens, in his dissent to the *McDonald* opinion, which addressed a similar citywide handgun ban in Chicago, recognized that this text from *Heller* provided little guidance on how to apply or interpret the longstanding prohibitions and presumptively lawful regulations referenced in *Heller*.¹⁰¹ Justice Stevens warned that *Heller* “unleashed . . . a tsunami of legal uncertainty, and thus litigation,”¹⁰² and that the Court “haphazardly created a few simple rules, such as that it will not touch prohibitions on the possession of firearms by felons and the mentally ill,” simply because they “sound sensible.”¹⁰³ “But why these rules and not others?” Justice Stevens asked, “[d]oes the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know.”¹⁰⁴ Stevens questioned the use of empirical studies that allegedly support such regulations, such as expert calculations on how many lives were saved by Chicago’s handgun ban, and wondered how to consider any existing counter-studies raised by opponents to the ban. Judges do not know the answers to empirically based questions that may inform the need for a particular form of gun regulation, which makes it difficult for them to weigh the strength of a particular state interest cited as justification against an individual’s right to bear arms.¹⁰⁵

2. The Impending Legal Tsunami

Following the *Heller* decision, the First Circuit was asked to decide, in the 2012 case *United States v. Rehlander*,¹⁰⁶ whether a temporary emergency

100. *Id.*

101. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3127 (2010) (Stevens, J., dissenting).

102. *Id.* at 3105.

103. *Id.* at 3127.

104. *Id.*

105. *Id.*

106. *United States v. Rehlander*, 666 F.3d 45, 46 (1st Cir. 2012).

hospitalization pursuant to a Maine statute¹⁰⁷ constituted a commitment within the meaning of the GCA.¹⁰⁸ The Court found that it did not, and that for the purposes of the GCA, “committed to any mental institution,” does *not* include temporary emergency hospitalizations, for the following reasons: such procedures are accompanied only by an ex parte hearing; are temporary, emergency “*hospitalizations*,” as opposed to “*commitments*,” and because Maine law provides a different method for effectuating a full-scale commitment, which carries with it a state prohibition against firearms ownership, which presumptively creates a GCA ban as well.¹⁰⁹ In deciding *Rehlander*, the First Circuit overturned a line of precedent holding otherwise.¹¹⁰ The *Rehlander* Court pointed out that *Heller* adds a “constitutional component” to future considerations of firearms rights revocations, and that the rights conferred by the Second Amendment cannot be “withdrawn by government on a permanent and irrevocable basis without due process.”¹¹¹ The First Circuit also noted that deprivation of firearms rights under federal law is currently permanent, with no mechanism to

107. ME. REV. STAT. tit. 34-B, § 3863 (2012). This statute provides that an individual may be “admitted to a psychiatric hospital on an emergency basis” following ex parte procedures, pursuant to an application by a healthcare professional or law enforcement officer and a certification from a judge confirming proper procedures were followed. In contrast, ME. REV. STAT. tit. 34-B, § 3864 (2012) provides a more detailed process for the involuntary “commitment” of an individual, which is accompanied by a full adversarial judicial proceeding. Maine law actually prohibits firearm possession by an individual committed under section 3864, but not section 3863, which the *Rehlander* Court found persuasive in declining to bring section 3863 commitments within the meaning of the GCA. See *Rehlander*, 666 F.3d at 49.

108. *Rehlander*, 666 F.3d at 47. Nathan Rehlander, the petitioner, had been hospitalized under ME. REV. STAT. tit. 34-B, § 3863 on March 28, 2007 after he self-reported a suicide attempt and a crisis clinician determined that he “was mentally ill” (specifically, he was bipolar and a paranoid schizophrenic) and posed a likelihood of serious harm, as indicated by his self-proclaimed plan to hang himself. This report was certified by a nurse practitioner. A social worker and doctor subsequently agreed with the prior opinions, finding that Mr. Rehlander posed a “likelihood of serious harm” and exhibited symptoms of mental illness, such as “elevated mood, pressured speech, distractibility” and “increased grandiosity; disorganized thoughts; placing self and others in harm’s way in imminent manner, delusional.” Authorities initiated a full-scale commitment proceeding under section 3864, however the judge found that the state did not meet its burden in proving an adequate basis for the full-scale involuntary commitment under that provision. *United States v. Rehlander*, 685 F. Supp. 2d 159, 161 (D. Me. 2010) *rev’d*, 666 F.3d 45 (1st Cir. 2012).

109. *Rehlander*, 666 F.3d at 49-50 (emphasis added).

110. *Id.* at 46 & n. 1 (overturning *United States v. Chamberlain*, which held that an emergency involuntary commitment without an adversarial hearing or judicial determination is a “commitment” within the meaning of section 922 (g)(4)); *Chamberlain*, 159 F.3d 656 (1st Cir. 1998).

111. *Rehlander*, 666 F.3d at 48.

petition for relief at the federal level,¹¹² and that “[i]t could . . . be different if section 922 permitted one temporarily hospitalized on an emergency basis to recover, on reasonable terms, a suspended right to possess arms on a showing that he now no longer posed a risk of danger.”¹¹³

The *Rehlander* decision is noteworthy for several reasons: it considers *Heller* as adding a constitutional component to future inquiries; it addresses the permanency of firearms prohibitions under federal law; and it raises an important question regarding the relationship between state laws providing for commitments or hospitalizations and the GCA.¹¹⁴ The *Rehlander* Court recognized that other federal appellate courts had not yet applied *Heller* to similar cases, and noted the split among courts.¹¹⁵

III. STATE LAWS

States may enact legislation that more strictly regulates firearms use, generally by restricting possession by certain categories of people (as federal law does) or by restricting gun use in certain locations. Several states have expanded on the national prohibited persons categories to include broadly defined groups, such as Hawaii, which includes anyone who has “been diagnosed as having a significant behavioral, emotional, or mental disorders as defined by the most current diagnostic manual of the American Psychiatric Association or for treatment for organic brain syndromes.”¹¹⁶ Several states apply the prohibition to individuals who are “intellectually disabled,” such as Illinois¹¹⁷ and Florida; the latter definition includes anyone who, “as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs.”¹¹⁸

California has enacted what is seemingly the most comprehensive legislation in the country regarding firearms restrictions for individuals with behavioral disorders.¹¹⁹ The California Code enumerates several situations wherein healthcare professionals or law enforcement officers can alert to a

112. Although 18 U.S.C. § 922(c) allows individuals who have had their firearms privileges revoked to petition for reinstatement, Congress has repeatedly withdrawn funding from the ATF to investigate such petitions. See Gregory J. Pals, *Judicial Review of Firearms Disabilities*, 76 WASH. U.L. REV. 1095, 1097 (1998).

113. *Rehlander*, 666 F.3d at 49

114. *Id.*

115. *Id.*, at 48 and at n. 1.

116. HAW. REV. STAT. § 134-7.

117. ILL. COMP. STAT. 720- §5/24-3.1 (prohibiting possession of firearms and ammunition by these individuals).

118. FLA. STAT. § 790.065(4).

119. CAL. WELF. & INST. CODE § 8100, *et seq.* (2014).

patient or threatening individual in order to have the individual's firearms rights temporarily or permanently revoked, depending on the applicable provision.¹²⁰ One of the key elements of the California Code is that it provides for situations where firearms deprivation can be temporary, such as for a term of six months, five years, or throughout the duration of an inpatient hospitalization, and also provides a mechanism that allows individuals to petition for relief from the firearms restriction once the prohibitory period expires.¹²¹

Specifically, California restricts individuals from possessing firearms for a six-month period if a psychologist determines the individual presents a threat of physical violence against a "reasonably identifiable victim."¹²² Once the psychologist reports the incident to local law enforcement, the California Department of Justice will send the individual at issue a notice that they are prohibited from possessing or purchasing a firearm or deadly weapon for six months from the date of report.¹²³ The individual may petition to a California court for restoration of these rights and would then be given an in-camera hearing to determine whether the petitioning individual has established, by a preponderance of the evidence, that they are able to use a firearm in a "safe and lawful manner."¹²⁴

The California Code also provides that firearms rights should be revoked after the occurrence of several situations involving any individual who has been: found to be not guilty by reason of insanity in a court of law;¹²⁵ found mentally incompetent to stand trial by a court of law;¹²⁶ placed under a conservatorship by a court due to grave disability as a result of mental disorder or chronic alcoholism, provided the court finds that possession would present a danger to the safety of the person or others;¹²⁷ or admitted to a facility because he has been found to be a danger to himself or others.¹²⁸ Any individual subject to these provisions is also given the right to petition a California court for restoration of firearms rights privileges and is guaranteed a hearing regarding the same within 30 days of their petition.¹²⁹

120. *Id.* at § 8103 (amended 2014).

121. *Id.*

122. *Id.* at § 8100(b)(1).

123. *Id.* at § 8100(b)(2).

124. *Id.* at § 8100(b)(3)(B).

125. CAL. WELF. & INST. CODE § 8103(b)(1). *See also id.* at § 8100(c)(1).

126. *Id.* at § 8103(d)(1) (outlining that an individual may have their rights restored if the committing court finds the person has been restored to competent).

127. *Id.* at § 8103(e)(1) (stating that firearms possession is only prohibited during the conservatorship).

128. *Id.* at § 8103(f)(1) (outlining that possession is prohibited for five years commencing from the time of release. The individual may petition to a court for restoration of rights before the five year deadline).

129. *Id.* at § 8100.

The common element in the provisions of the California Code referenced herein is that there generally must be a finding of dangerousness, either by a healthcare professional or judicial authority, depending on the applicable section of the Code.¹³⁰

A brief overview of state law indicates that several states have expanded restrictions for individuals believed to be a risk as a result of their mental state. While such laws have the laudable goal of promoting public safety, the laws are also potentially over-inclusive and encompassing expansive categories of individuals. California's legislative efforts allow for the temporary revocation of firearms rights, which does not exist at the federal level. California also involves the opinion of medical examiners and psychiatrists, who are trained to assess risks and warning signs associated with individual behavior.

IV. RESEARCH SURVEYING THE CONNECTION BETWEEN MENTAL ILLNESS AND VIOLENCE

It is easy to accept the tautology advanced by media reports that, because some of the recent mass shootings in America have involved shooters with documented mental health issues, people with a history of mental illness pose a greater risk of violence than other categories of people. To begin with, just as the legislative record reveals uncertainty as to the type of individual believed to represent a heightened risk for gun violence,¹³¹ despite extensive study into the relationship between mental illness and violence, psychological research has yielded no conclusive results.¹³² Instead, this complicated relationship has led some psychologists to caution that developing a "standardized, reliable, generalizable set of criteria for dangerous prediction in law and mental health is an elusive and distant objective."¹³³

One apparent reason for this is that there are wide variances in study methodology.¹³⁴ Studies, when examined together, reveal that "[e]ach

130. *Id.*

131. *See supra* Section II.

132. Charles W. Lidz, et al., *Violence and Mental Illness: A New Analytical Approach*, 31 AM. PSYCHOLOGY ASSOC. 23, 23-24 (2007) (noting that "[r]esearch has produced a mixed picture of the connection of mental illness and violence, with empirical studies varying in their conclusions about the relationship between mental illness and violence"). *Id.* at 23.

133. Bonta, *supra* note 19, at 124.

134. Lidz, et al., *supra*, note 132, at 23-24 (reviewing a number of studies and noting a "mixed picture of the connection of mental illness and violence," with some studies finding an integral link between psychosis and violence, and others studies indicating there is only a weak association between mental illness and violence, absent a co-morbid factor such as substance abuse).

investigation suffers from some methodological shortcoming,” such as, “[a] lack of clarity about the definition of mental illness, use of only official records, inadequacy of the comparison group, and problems of retrospective reporting.”¹³⁵

As a preliminary matter, the term “mentally ill” encompasses a very broad range of cognitive behaviors¹³⁶ and affects a very large portion of society.¹³⁷ It is estimated that one in four American adults experience mental illness in a given year, and that one in seventeen adults live with a “serious” mental illness, such as schizophrenia, major depression, or bipolar disorder.¹³⁸ The United States Center for Disease Control (“CDC”), which is the national public health institute under the Department of Health and Human Services, defines “mental illness” as “collectively . . . all diagnosable mental disorders,” which are “health conditions that are characterized by alterations in thinking, mood, or behavior . . . associated with distress and/or impaired functioning.”¹³⁹ Moreover, the range of diagnoses falling under the term “mental illness” has been cited as one of the limitations to the current body of research on behavioral health; one scientist reported that “[t]he level of violence found in samples of disordered individuals in the community varies widely, from 8 percent to about 45 percent, depending on the definitions of disorder and violence used.”¹⁴⁰ This finding highlights one of several concerns to keep in mind when reviewing research in this area—studies of mental illness may include individuals who are diagnosed with a lower “level of disorder” (such as depression or anxiety), while other studies may focus on a particular disorder, such as schizophrenia, or may survey only serious mental illnesses collectively (such as major depression, schizophrenia, and bipolar disorder), leading to varied results.¹⁴¹

135. Edward P. Mulvey, *Assessing the Evidence of a Link Between Mental Illness and Violence*, in AM. PSYCHIATRIC ASS’N., *VIOLENT BEHAVIOR & MENTAL ILLNESS: A COMPENDIUM OF ARTICLES FROM PSYCHIATRIC SERVICES & HOSPITAL & COMMUNITY PSYCHIATRY* 14, 15 (Psychiatric Res. Ctr. of the Am. Psychiatric Ass’n 1997).

136. U.S. DEPT. OF HEALTH & HUM. SERVS., *MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL* 1 (1999).

137. *Id.* at 4.

138. *Mental Illness Facts and Numbers*, NAT’L INST. MENTAL HEALTH, available at http://www.nami.org/factsheets/mentalillness_factsheet.pdf (last visited May 1, 2013).

139. U.S. DEPT. OF HEALTH & HUM. SERVS., *supra* note 136, at 5.

140. Edward P. Mulvey, *Assessing the Evidence of a Link Between Mental Illness and Violence*, in AM. PSYCHIATRIC ASS’N., *VIOLENT BEHAVIOR AND MENTAL ILLNESS: A COMPENDIUM OF ARTICLES FROM PSYCHIATRIC SERVICES AND HOSPITAL AND COMMUNITY PSYCHIATRY* 14, 15 (Psychiatric Res. Ctr. of the Am. Psychiatric Ass’n 1997).

141. *See id.*; *see also* Frederick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 14-15 (2013). This article discusses a study by Jeffrey Swanson, which considered schizophrenia, bipolar disorder, major depression, obsessive compulsive disorder, panic disorder, substance abuse, and phobia. After breaking down each illness and surveying it separately, the study found that

Another limitation to current research is that violence is difficult to measure directly, so researchers have used a variety of methods to acquire data on acts of violence.¹⁴² The earliest studies on mental illness and violence, apparently beginning in the 1970s, relied on data from official records of documented violence.¹⁴³ Specifically, several studies based their data on official records of violent behavior by patients who had once been clinically assessed as a danger to others and committed to a state hospital, and were subsequently released pursuant to a judicial order.¹⁴⁴ The studies tracked a specific group of individuals after their release and looked for subsequent acts of violence after discharge, and determined that “violence among people with mental illness was quite rare.”¹⁴⁵

By the 1990s, however, study methodology changed, and researchers began to use a multisource approach, where studies relied on “a mixture of sources including self-report, collateral reports from family or friends, and police and medical records.”¹⁴⁶ The new multisource approach resulted in “report[s] that rates of violence were much higher than had previously been thought” under the study methodology of the 1970s.¹⁴⁷

In addition to variances in reporting data and inconsistencies regarding the types of disorders considered, there are a variety of co-existing variables that may not be controlled for, but have the potential to exaggerate or cause differences in data, such as: the type of violence surveyed; the existence of a comorbid disorder like substance abuse;¹⁴⁸ the presence and severity of active symptoms or psychosis;¹⁴⁹ or certain socioeconomic factors that are independently linked to violent behavior.¹⁵⁰

Renewed research efforts have begun looking at the relationship between violence and mental illness by more closely examining and controlling for relevant variables, such as those listed above, which may serve to more clearly explain any association with mental illness and a propensity for

schizophrenia, of the non-substance abuse disorders, had the highest association with violence, including with a firearm, at 8.58%, compared to .40% by individuals with no disorder. *Id.*

142. See Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121 (2003); see also Lidz, et al., *supra*, note 132, at 23-24.

143. Lidz, et al., *supra*, note 132, at 23-24.

144. *Id.*

145. *Id.* at 24.

146. *Id.*

147. *Id.*

148. E. Fuller Torrey, *Violent Behavior by Individuals with Serious Mental Illness, The Role of Treatment Compliance and Insight*, in INSIGHT & PSYCHOSIS 269 (Xavier F. Amador & Anthony S. David eds., 1998).

149. Lidz, et al., *supra*, note 132, at 23-24.

150. Bonta, *supra* note 19, at 124.

violence.¹⁵¹ For example, Jeffrey Swanson, a Professor of Psychiatry and Behavioral Health at the Duke University School of Medicine,¹⁵² is conducting a study discussing three theories on this relationship. His research looks at psychopathological motivations, which reviews violent behavior and manifestations of mental illness; criminogenic risk exposure, which attributes violence to social and environmental factors; and social processes, which examines labels imposed by society on the mentally ill regarding their assumed violent disposition.¹⁵³ In addition to other considerations, Swanson's study will also review the effectiveness of background checks and current firearms law in reducing violence in relation to this issue.¹⁵⁴ Studies such as Swanson's are important, because this research involves an assessment not only of behavioral or mental disorders, but also the impact that pervasive and negative public perception has on individuals suffering from such disorders.

Research efforts have also included examining the presence of certain behaviorisms, deemed "warning behaviors" by one group of scientists, which constitute a toxic change in an individual that is evidence of an increased or accelerated risk for violence.¹⁵⁵ Warning behaviors become relevant after an individual has raised a red flag to a particular threat assessor, and may help with risk management, as opposed to violence prediction.¹⁵⁶ This means that, instead of attempting to predict dangerousness by labeling people as high or low risk based on their association with a particular group that may be statistically correlated with violence, a threat assessor (such as a medical professional) would watch for *changes* in patient behavior that tends to alert to an increased risk for violence.¹⁵⁷ One study points out that, while the study of warning behaviors as a tool for threat assessment is not new, the typology of such warning behaviors should be further examined.¹⁵⁸ Different acts of violence, such as work place violence, targeting a public figure, adult mass shooters, or school shooters, will involve different types of warning behaviors that could be informed by further research. This shifts the focus from a particular group

151. *Services Effectiveness Research Program*, DUKE UNIV. SCH. OF MED., <http://serp.mc.duke.edu/Firearm%20Laws,%20mental%20disorder,%20and%20violence.htm> (last visited May 10, 2014) (describing a research project titled "Firearms Law, Mental Disorder, and Violence", by chief investigator Jeffrey Swanson).

152. *Duke Psychiatry and Behavioral Sciences: Faculty*, DUKE UNIV. SCH. OF MED., <http://psychiatry.duke.edu/faculty/details/0112411> (last visited Feb. 4, 2013).

153. DUKE UNIV. SCH. OF MED., *supra* note 151.

154. *Id.*

155. J. Reid Meloy, et al., *The Role of Warning Behaviors in Threat Assessment: An Exploration and Suggested Typology*, 30 BEHAV. SCI. & L. 256, 256, 260 (2011).

156. *Id.*

157. *Id.*

158. *Id.* at 260.

of individuals, or from a particular diagnosis, to an individual, and instructs response based upon individual changes in behavior.

V. CONCLUSION

Mass shootings differ from generalized gun violence in high-crime areas for several reasons, one of which is that the public often perceives them as preventable. These tragic events always call attention back to the gun control debate, particularly in the form of demands for the expansion of the background check system. As indicated, the background check system is dependent upon the presence and quality of records of individuals disqualified under federal law, or local law where relevant. Disqualifying records can only be effective in catching potentially risky individuals if they are correct in assuming a higher degree of risk based on an affiliation with a particular subgroup of the population.

The statutory scheme of the Gun Control Act depends on the validity of language identifying risky individuals, including those being adjudicated as having a mental defect or being committed to a mental institution. Notwithstanding the ambiguity surrounding what constitutes a “mental defect,” as scientists have warned, it is impractical to rely on mental defectiveness, even if clearly defined, as a prediction for dangerousness. As federal courts struggle to interpret the legislative intent behind the statutory language of the Gun Control Act, states have moved forward to enact their own legislation identifying categories of people state legislators feel should be prohibited from possessing guns. States like California have developed laws that provide for the temporary revocation of firearms rights, and also allowed for judicial procedures that account for individual due process rights. California’s legislation gives greater deference to the opinion of health care professionals, who are presumably more skilled in identifying individuals who create an increased risk for violence, to alert authorities to such persons.